UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: BKY No.: 09-50779
Chapter 7

Dennis E. Hecker,

Debtor.

Randall L. Seaver, Trustee, Adv. No.: 11-5001

Plaintiff,

vs.

Estate of William James Prohofsky,

Defendant.

RESPONSE OF TRUSTEE TO MOTION FOR REMAND

INTRODUCTION

The Personal Representative of the Estate of William J. Prohofsky ("**PR**") requests that this Court remand the matter of ownership of $10,000.00 to the state court. As a clarification, the only matter which Randall L. Seaver, Trustee ("**Trustee**") intended to remove to this Court was the issue of ownership of the funds held by the Office of the U.S. Attorney.[1]

The PR is not following the procedures set forth in Bankruptcy Rule 9027(e), but the Trustee is proceeding as though the PR had done so, as the Trustee could not locate a case where noncompliance with the Rule resulted in an adverse consequence. However, without regard to procedural matters, the issue of the ownership of $10,000.00 should be determined by the Bankruptcy Court.

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[1] Oddly, even if the probate estate were to recover the $10,000.00, it appears that it would remain administratively insolvent. Neither the PR nor the Prohofsky heirs will, apparently, receive any amount from the probate proceedings with the sole beneficiary being the funeral home and counsel for the probate estate, Mr. Scott Hoffman. Burton Affidavit, Ex B at p. 20.

One thing should be noted at the outset: Neither side to this matter possesses anything but circumstantial evidence. However, the only fact favorable to the PR is that $10,000.00 was in the safe deposit box of William J. Prohofsky ("**Prohofsky**"). The PR has no other facts which support his contention that the money is property of the probate estate. On the other hand, as will be detailed herein, it is clear that Prohofsky had limited means and was a pawn in the scheme of Dennis E. Hecker to defraud the Trustee and his creditors. This money, and substantial other funds, passed through Prohofsky's hands at the direction of Dennis E. Hecker ("**Hecker**").

STATEMENT OF FACTS

When Prohofsky passed away, his income was limited to social security of approximately $19,000.00 per annum. Burton Affidavit, Exhibit A (Prohofsky 2007 and 2008 federal income tax returns). Before and after June 4, 2009, the date of Hecker's bankruptcy filing, Prohofsky actively aided and abetted Hecker in the commission of multiple frauds upon his creditors. Prohofsky also assisted Hecker in defrauding the Trustee, and, indeed, committing a fraud upon this Court. Prohofsky received at least $80,000.00 of pass-through money which he concealed from the Trustee and this Court. Burton Affidavit, Exhibit B (Government's Sentencing Position dated January 13, 2011), p. 3. Prohofsky used his bank account to pay Hecker's bills. *Id.*, at 17. As the government noted, "Hecker wanted it to appear as if the money was Prohofsky's . . ." *Id.* (emphasis added). Hecker used the Prohofsky account to hide Prudential checks. *Id.* Hecker had Prohofsky hide gift cards. *Id.*, at 18. Prohofsky executed a fraudulent lease for a mansion on Cross Lake, MN, making it more difficult for the Trustee to recover the property and its contents. *Id.*, at 19.

Prohofsky's Bankruptcy Rule 2004 testimony and exhibits thereto lays bare Prohofsky's role in the fraud. When Prohofsky passed away on March 4, 2010, just days later, he had in his safe deposit box the following items:

a) Envelope containing residential lease/Jacob Holdings of Cross Lake – this is the aforementioned fraudulent lease.

b) Bankruptcy Court motion for approval of a settlement agreement – which settlement is unknown, but it is a Hecker-related item.

c) Focus Rental, LLC Memo – this entity is controlled by James Gustafson and was involved in the fraud perpetrated upon the estate by the looting of the Hecker children's trust accounts.[2]

d) Emails/copy of check Hecker/Jacob Holdings of St. Cloud – another Hecker-related item.

e) Envelope labeled 2009 money for taxes containing $10,000.

PR's Affidavit, Exhibit A.

The only item not conclusively identifiable as being Hecker-related is the $10,000.00 in cash. However, Prohofksy's testimony in his 2004 examination and his personal financial circumstances dictate that the $10,000.00 was Hecker's money and, thus, property of the bankruptcy estate per 11 U.S.C. §541 (*and such property right precedes the creation of the probate estate*). Substantial additional evidence exists, in addition to the foregoing, which shows that Prohofsky was only holding an asset of the bankruptcy estate. The evidence that Prohofsky had helped Hecker conceal and convert tens of thousands of dollars of bankruptcy estate property is irrefutable. Among that evidence is:

[2] Both Mr. Prohofsky and the PR's counsel Scott Hoffman were involved in these transactions.

1. Hecker was having discussions with the Trustee about the preparation of 2008 and 2009 tax returns. It was made clear to Hecker that it is his personal obligation to complete his returns at his own cost. Burton Affidavit, Exhibit D (correspondence with William Skolnick regarding preparation of tax returns). Hecker had represented to the Trustee that the cost of preparing the returns would be tens of thousands of dollars. *Id.* Accordingly, Hecker had a need for money to pay for the preparation of tax returns.

2. Prohofsky did not have the need for $10,000.00 to pay income taxes. In 2008, Prohofsky's federal income tax liability was $0.00 on $19,193.00 of social security benefits and no other income. Burton Affidavit, Exhibit A. In 2007, his federal income tax liability was $0.00 on $18,762.00 of social security benefits and no other income. *Id.* In 2009, his circumstances were the same except that he acted as a conduit for Hecker to pay bills and secrete money. One of Prohofksy's handwritten notes evidence that he spent at least $60,000.00 of the Hecker funds for Hecker-related matters. Burton Affidavit, Exhibit C (Prohofsky Examination at Exhibit 19). Certainly, no party can identify any legitimate, income-producing activity on the part of Prohofsky which would generate an income tax liability.

3. In his 2004 examination, Prohofsky testified about receiving $10,000.00 from a $20,500.00 deposit. What he considered that money to be is entirely unclear from his examination. However, the $20,500.00 deposit was made on May 28, 2009 – a week before this case was commenced. Part of Prohofsky's testimony was, "I believe that when the money went into my account, I then decided to give it to Denny, but I didn't buy the gift cards until later. Now I don't know if I am confusing you or you are confusing me." Burton Affidavit, Exhibit C at p. 64.

4. Mr. Prohofsky did not possess a safe deposit box for a lengthy period of time as posited by the PR (without a factual basis). Mr. Prohofsky testified that he had only recently opened the box (December 2008/January 2009). Burton Affidavit, Exhibit C at p. 38.

5. Mr. Prohofsky could not identify evidence that he worked for Hecker or his entities. Burton Affidavit, Exhibit C at pps. 15-17.

6. Mr. Prohofsky's only source of $10,000.00 in cash was cash obtained by him through his role in the Hecker scheme perpetrated to defraud the estate of over $80,000.00.

ARGUMENT

The PR makes much out of *Marshall v. Marshall*, 547 U.S. 293 (2006). However, that case is inapplicable to these proceedings. In *Marshall*, the Supreme Court held that the "probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Id.*, at 296. The Supreme Court reasoned that since Ms. Marshall's claim did not involve administration of the estate, the probate of a will, nor did it seek to reach a *res* in the custody of the state court, that the probate exception was not applicable. *Id.*

In this case, the state court did not have property, the *res*, in its custody. The $10,000.00, at all times material hereto, has been property of the bankruptcy estate in the possession of the U.S. government. The Trustee believes that at all times since June 4, 2009, the $10,000.00 has been property of the bankruptcy estate and never passed in the subsequent probate estate. See, *In re Lott*, 332 B.R. 292 (Bankr. E.D. Mich. 2005). The PR has not met his burden to show otherwise. See, *Mahera v. Clear Channel Communications, Inc.*, 239 F.R.D. 70, 78-79 (S.D.N.Y. 2006) (discussion of burden in non-bankruptcy context).

There are two main bases for the probate exception to federal jurisdiction. First, issues of probate administration involve *in rem* disputes over property in the probate court's control, in which other courts should not become entangled. *Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006). Second, state courts have unique proficiencies, in terms of legal acumen, procedures, and specialized staff, to deal with probate matters, which federal courts lack. *Id.,* at 307. Neither of these bases has any bearing on this matter. The state court did not have jurisdiction over the money (as it was either property of the estate or not in the control of the state court) and the probate court possesses no special acumen to determine the nature of the funds.

CONCLUSION

This Court should retain jurisdiction and the PR's motion for remand should be denied.

LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.

Dated: January 28, 2011

/e/ Matthew R. Burton
By:___________________________
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ATTORNEYS FOR RANDALL L. SEAVER, TRUSTEE

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AFFIDAVIT OF MATTHEW R. BURTON

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Your Affiant, being first duly sworn, deposes and states as follows:

1. I am the attorney for Randall L. Seaver, Trustee, the Plaintiff in this matter.

2. Attached hereto as Exhibit A are William Prohofsky's federal income tax returns for 2007 and 2008 which were provided by his counsel pursuant to a subpoena.

3. Attached hereto as Exhibit B is a true and correct copy of the Government's Sentencing Position dated January 13, 2011.

4. Attached hereto as Exhibit C is a true and correct copy of the transcript of William Prohofsky taken on February 10, 2010 with exhibits.

5. Attached hereto as Exhibit D is a copy of correspondence between the Debtor and William Skolnick regarding the preparation of tax returns. Debtor and his counsel had represented that the cost of preparing tax returns would be tens of thousands of dollars.

FURTHER YOUR AFFIANT SAYETH NOT.

/e/ Matthew R. Burton

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Matthew R. Burton

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UNSWORN CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, I caused the following documents:

Response of Trustee to Motion for Remand and Affidavit of Matthew R. Burton

to be filed electronically with the Clerk of Court through ECF, and that the above documents will be delivered by automatic e-mail notification pursuant to ECF and this constitutes service or notice pursuant to Local Rule 9006-1(a).

Dated: January 28, 2011

/e/ Stephanie Wood

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